

OPEN MEETING ITEM
ORIGINAL



0000063390

COMMISSIONERS
JEFF HATCH-MILLER - Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
BARRY WONG



ARIZONA CORPORATION COMMISSION

DATE: NOVEMBER 7, 2006
DOCKET NOS: T-03654A-05-0350 and T-01051B-05-0350
TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Order on:

LEVEL 3 COMMUNICATIONS/QWEST CORPORATION
(ARBITRATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

NOVEMBER 16, 2006

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

NOVEMBER 21, 2006 and NOVEMBER 22, 2006

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

RECEIVED

2006 NOV -7 P 3:18

AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission

DOCKETED

NOV -7 2006

DOCKETED BY	NR
-------------	----

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 JEFF HATCH-MILLER, Chairman
4 WILLIAM A. MUNDELL
5 MIKE GLEASON
6 KRISTIN K. MAYES
7 BARRY WONG

8 IN THE MATTER OF THE PETITION OF LEVEL
9 3 COMMUNICATIONS LLC FOR ARBITRATION
10 OF AN INTERCONNECTION AGREEMENT
11 WITH QWEST CORPORATION PURSUANT TO
12 SECTION 252(b) OF THE
13 TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-03654A-05-0350

DOCKET NO. T-01051B-05-0350

DECISION NO. _____

14 **ORDER**

11 Open Meeting
12 November 21 and 22, 2006
13 Phoenix, Arizona

14 **BY THE COMMISSION:**

15 * * * * *

16 Having considered the entire record herein and being fully advised in the premises, the Arizona
17 Corporation Commission ("Commission") finds, concludes, and orders that:

18 **FINDINGS OF FACT**

19 1. On May 13, 2005, Level 3 Communications, LLC ("Level 3") filed with the Arizona
20 Corporation Commission ("Commission") a Petition for Arbitration of certain terms, conditions and
21 prices for interconnection and related arrangements with Qwest Corporation ("Qwest") ("Petition")
22 pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 ("Act" or "1996 Act").

23 2. The arbitration hearing convened as scheduled on September 8, 2005, September 9,
24 2005 and September 16, 2005.

25 3. The Commission issued a final Order on the Arbitration Petition in Decision No. 68817
26 (June 29, 2006), which resolved all of the issues raised in the arbitration petition and response.

27 4. Decision No. 68817 ordered Qwest and Level 3 to: (1) work together to implement
28

1 within thirty (30) days of the effective date of the Decision, an interim replacement for VNXX¹ which
2 the Commission referred to as "FX-like traffic"; (2) that such ISP-bound and VoIP FX-like traffic
3 shall be routed over a direct end office trunk between Level 3's network and the Qwest end office
4 serving the local calling area of the originating Qwest end user, and that the direct end office trunk
5 shall be established and paid for by Level 3; (3) that within sixty (60) days of the effective date of the
6 Decision, Level 3 shall cease using VNXX; (4) that the interim use of FX-like traffic shall be allowed
7 to continue until such time as the Commission issues a Decision resolving the issues concerning the
8 use of VNXX; and (5) that Level 3 and Qwest shall prepare and sign an interconnection agreement
9 incorporating the terms of the Commission's resolutions, and shall submit such signed interconnection
10 agreement to the Commission for its review within thirty days of the date of the Decision.

11 5. Upon the request of the parties, and good cause appearing, by Procedural Order dated
12 August 2, 2006, the date for filing a conforming interconnection agreement was extended from July
13 31, 2006, until August 18, 2006.

14 6. On August 18, 2006, Level 3 filed a Notice of Filing Conformed Agreement in
15 Compliance with Decision No. 68817 and Motion to Adopt Language in Agreement Regarding FX-
16 like in Compliance with Decision No. 68817. Level 3 attached a copy of its proposed Interconnection
17 Agreement, which it stated conformed with Decision No. 68817.

18 7. On August 18, 2006, Qwest filed a Notice of Filing and Request for Procedural
19 Conference. Qwest attached its proposed Interconnection Agreement, which it stated conformed with
20 Decision No. 68817.

21 8. The parties did not file a signed Interconnection Agreement that conformed to Decision
22 No. 68817 because they were unable to reach agreement on how to memorialize and implement the
23 order to eliminate the use of VNXX and institute an "FX-like" interim solution. In addition, the
24 parties could not agree on whether to memorialize the interim FX-like arrangement in an amendment
25 to the Interconnection Agreement, as advanced by Qwest, or in the body of the Interconnection
26 Agreement, as proposed by Level 3.

27 ¹ VNXX or virtual NXX is an arrangement under which a carrier assigns a phone number to a customer that is not
28 physically located in the rate center or exchange with which that phone number is associated. The effect is that calls that
would otherwise be rated and routed as long distance toll calls, are rated and routed as local calls.

1 9. Qwest and Level 3 disagree on what the Commission intended when it ordered that the
2 parties, on an interim basis, should implement an "FX-like" service.

3 10. Qwest argues that Decision No. 68817 requires Level 3 to order FX-like facilities from
4 the local calling area of its end users, and to establish FX-like direct trunking facilities from the local
5 calling area of its end user customers to each end office that it wishes to exchange traffic with Qwest
6 outside of the Phoenix local calling area. Qwest asserts that if Level 3's position it adopted, Level 3
7 would make virtually no changes to its network and would be continuing to utilize a VNXX
8 architecture under another name.

9 11. Level 3 argues that the Commission did not intend that in the interim period, Level 3
10 would have to alter its network architecture. Level 3 believes the Commission intended the basic
11 network architecture to remain, but for Level 3 to compensate Qwest for the transport of traffic out of
12 the local calling area of Qwest's originating caller.

13 12. By Procedural Order dated August 24, 2006, a Procedural Conference convened on
14 September 6, 2006, with the purpose of establishing a procedure for resolving the dispute. Qwest,
15 Level 3 and the Commission's Utility Division Staff ("Staff") participated. At that time, the parties
16 agreed to participate in a mediation with Staff in an attempt to resolve, or at least narrow the issues for
17 hearing.

18 13. On September 22, 2006, Qwest filed a Motion to Allow Additional Briefing. Qwest
19 asserts that the recent Ninth Circuit Court of Appeal's decision in *Verizon California v. Peevey*, 2006
20 WL 2563879, which was issued on September 7, 2006, impacts Decision No. 68817 and the
21 interconnection agreement to be submitted pursuant to Decision No. 68817. Qwest believes that the
22 *Peevey* case supports Qwest's position that it is unlawful to require Qwest to pay Level 3 terminating
23 intercarrier compensation on interexchange traffic (including specifically VNXX traffic).

24 14. A Procedural Conference to determine the status of the negotiations convened on
25 September 25, 2006. At the September 25, 2006 Procedural Conference, the parties reported that they
26 continued to engage in discussions, but that final language that would resolve the dispute could not be
27 agreed upon that day. The parties proposed that the Commission convene another Procedural
28 Conference in approximately one week, at which time they believed they would know if the matter

1 could be settled, or would need to be set for hearing. Staff concurred that the parties' proposal was
2 reasonable and could result in a successful compromise.

3 15. By Procedural Order dated September 26, 2006, a Procedural Conference was set for
4 October 3, 2006. Staff distributed "Staff's Proposed FX-Like Traffic Language for the
5 Interconnection Agreement" dated October 3, 2006. A copy of Staff's proposed language is attached
6 hereto as Exhibit A, and incorporated herein by reference. At the October 3, 2006, Procedural
7 Conference, the parties reported that they were able to reach agreement on language for all sections of
8 the interconnection agreement, except for one. Although Level 3 and Staff were in agreement on all
9 issues, and Level 3 agreed to adopt all of Staff's proposed language in Exhibit A, Qwest did not agree
10 to the proposed language for Section 7.2.2.1.7.6 of the Interconnection Agreement. See Ex. A, issue
11 number 6.

12 16. Concerning Section 7.2.2.1.7.6, Staff's proposed language, as agreed to by Level 3,
13 provides:

14 For purposes of implementing the interim arrangement, Level 3 shall
15 establish a virtual POI in each Qwest Local Calling Area for the exchange
16 of FX-Like traffic where Level 3 does not currently have physical
17 collocation facilities. Level 3 agrees to compensate Qwest via monthly
18 payments equivalent to the MRC charges for Private Line with EICT and
19 Mux, ICDF frames and direct trunk transport (DTT) from the virtual POI
20 to each end office in the Local Calling Area of the virtual POI as if
21 facilities were provisioned to reach those Local Calling Areas where Level
22 3 does not currently have physical collocation facilities. Level 3 also
23 agrees to make a one time payment to Qwest to reimburse Qwest as if
24 Qwest had constructed ICDF collocation in each Local Calling Area
25 where Level 3 does not currently have physical collocation at this time.

21 17. Qwest argues that the Commission should schedule a hearing to determine the factual
22 issues of what FX-like traffic means and factual issues related to implementation or provisioning of
23 interconnection. Qwest argues that the proposed language is not specific regarding the
24 implementation of interconnection.

25 18. Level 3 believes that Staff's proposed language comports with Decision No. 68817 and
26 there are no factual disputes that would require a hearing.

27 19. Staff believes that the facts are not in dispute, but rather the issue is what the
28 Commission intended in Decision No. 68817 with respect to creating an interim FX-like solution.

1 Staff does not believe an evidentiary hearing is required.

2 20. We concur with Staff. The threshold issue before us is what did the Commission intend
3 in Decision No. 68817 when it ordered an interim "FX-like" solution. Specifically, in Decision No,
4 68817, the Commission ordered:

5 that Qwest shall work with Level 3 to implement within thirty (30) days of
6 the effective date of this Decision an interim replacement for VNXX
7 which we shall refer to as FX-like traffic. Such ISP-bound and VoIP FX-
8 like traffic shall be routed over a direct end office trunk between Level 3's
9 network and the Qwest end office serving the local calling area of the
10 originating Qwest end user. The direct end office trunk shall be
11 established and paid for by Level 3 under the terms of this Agreement.
12 *Decision No. 68817 at 82.*

13 21. The language of Decision No. 68817 does not require Level 3 to alter its network
14 architecture during the interim period, but rather that it should utilize direct trunk transport and
15 compensate Qwest for the transport of traffic. In the body of Decision No. 68817, the Commission
16 stated:

17 Although we disapprove Level 3's use of VNXX, as it has been described
18 in this proceeding, Level 3 should be able to serve its customers through
19 FX or an FX-like service. In addition, there may be ways whereby Level
20 3 could use "VNXX-like" arrangements and compensate Qwest for
21 transport (perhaps by using a TSLRIC rate) that would alleviate our
22 concerns about intercarrier compensation distorting the market by
23 improper cost shifting. Evidence of how such a scheme might work, or if
24 it could work, was not offered in this docket, but we would not want to
25 eliminate such compensation scheme and encourage the parties to be
26 creative in creating a "win-win" resolution and present a revised ICS for
27 our approval. *Decision No. 68817 at p 29, lines 5-12.*

28 22. Ultimately, although disapproving of VNXX arrangements pending its generic
investigation, in adopting the "FX-like" interim solution, the Commission determined that at least
temporarily, until the Commission could systematically and thoroughly study the implications of the
use of VNXX arrangements, Level 3 should be allowed to continue using VNXX type arrangements,
but would be required to pay for transport of traffic outside the local calling area of the originating
caller. In referring to the interim arrangements as "FX-like", the Commission did not intend that such
arrangement would be comparable to the FX service being provided by Qwest.

1 23. The parties should revise their Interconnection Agreement to incorporate Staff's
2 proposed language as set forth on Exhibit A and shall submit such Interconnection Agreement for
3 Commission review, within ten business days of the date of this Decision.

4 24. Qwest's Motion for additional briefing on the Ninth Circuit's decision in *Peevey* is
5 denied. The issue of intercarrier compensation on ISP-bound traffic was resolved in Decision No.
6 68817.

7 25. The Commission can consider the effects of the *Peevey* Decision in the generic
8 proceeding on VNXX.

9 26. The Commission has analyzed the issues presented by the parties and has resolved the
10 issues in accordance with the Act.

11 CONCLUSIONS OF LAW

12 1. Level 3 is a public service corporation within the meaning of Article XV of the
13 Arizona Constitution.

14 2. Level 3 is a telecommunications carrier within the meaning of 47 U.S.C. § 252.

15 3. Qwest is a public service corporation within the meaning of Article XV of the Arizona
16 Constitution.

17 4. Qwest is an ILEC within the meaning of 47 U.S.C. § 252.

18 5. The Commission has jurisdiction over Level 3 and Qwest and of the subject matter of
19 the Petition.

20 6. The Commission's resolution of the issues pending herein is just and reasonable,
21 meets the requirements of the Act and regulations prescribed by the FCC pursuant to the Act, is
22 consistent with the best interests of the parties, and is in the public interest.

23 ORDER

24 IT IS THEREFORE ORDERED that Qwest Corporation and Level 3 Communications, LLC
25 shall incorporate in the body of their Interconnection Agreement the proposed language set forth in
26 Exhibit A.

27 ...

28 ...

1 IT IS FURTHER ORDERED that the signed Interconnection Agreement shall be submitted to
2 the Commission for its review within ten business days of the date of this Decision.

3 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

4 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
5
6

7 _____
CHAIRMAN

COMMISSIONER

8
9
10 _____
COMMISSIONER

COMMISSIONER

COMMISSIONER

11
12 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
13 Director of the Arizona Corporation Commission, have
14 hereunto set my hand and caused the official seal of the
Commission to be affixed at the Capitol, in the City of Phoenix,
this ____ day of _____, 2006.

15
16 _____
17 BRIAN C. McNEIL
18 EXECUTIVE DIRECTOR

19 DISSENT _____
20

21
22 DISSENT _____
23

24 JR:mj
25
26
27
28

1 SERVICE LIST FOR: LEVEL 3 COMMUNICATIONS LLC/ QWEST
2 CORPORATION
3 DOCKET NO.: T-03654A-05-0350
4 T-01051B-05-0350
5 Michael W. Patten
6 Roshka DeWulf & Patten, PLC
7 One Arizona Center
8 400 E. Van Buren Street
9 Suite 800
10 Phoenix, Arizona 85004
11 Richard E. Thayer
12 Erik Cecil
13 Level 3 Communications, LLC
14 1015 Eldorado Boulevard
15 Broomfield, CO 80021
16 Henry T. Kelly
17 Joseph E. Donovan
18 Scott A. Kassman
19 Kelley, Drye & Warren LLP
20 333 West Wacker Drive
21 Chicago, IL 60606
22 Christopher W. Savage
23 Cole, Raywid & Braverman, LLP
24 1919 Pennsylvania Ave., NW
25 Washington, DC 20006
26 Norman G. Curtright
27 QWEST CORPORATION
28 4041 N. Central Ave., 11th Floor
Phoenix, AZ 85012
Thomas M. Dethlefs
Senior Attorney
Qwest Legal Dept/CD&S
1801 California St., Suite 900
Denver, Colorado 80202
Christopher Kempley, Chief Counsel
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007
Ernest Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

EXHIBIT A

STAFF PROPOSED FX-LIKE TRAFFIC LANGUAGE
FOR THE INTERCONNECTION AGREEMENT
October 3, 2006

1. Staff proposed language:

Section 7.2.2.1.7.1: Qwest and CLEC have been ordered by the Arizona Corporation Commission (Commission) to implement an interim replacement for Virtual NXX (VNXX) which shall be referred to as FX-Like Traffic.

2. Staff proposed language:

Section 7.2.2.1.7.2: Qwest and CLEC have been ordered by the Commission to establish a methodology for the exchange of "FX-Like Traffic" as an interim replacement for Virtual NXX (VNXX). The interim use of FX-Like Traffic, as described in this Section, shall be allowed to continue until such time as the Commission issues a decision resolving the issues concerning the use of VNXX.

3. Staff proposed language:

Section 7.2.2.1.7.3: For traffic exchanged between Level 3 and Qwest end-users, the FX-Like Traffic shall be exchanged at the Point of Interconnection (POI) located in the local calling area of such Qwest end-users. FX-Like traffic shall be routed over a direct end office trunk between CLEC's POI in the Local Calling Area and the Qwest end office serving the Local Calling Area of the Qwest end-user. The direct end office trunk shall be established and paid for by CLEC under the terms of this Agreement. CLEC shall be responsible for ordering direct-final end office trunking and transport from the Qwest end office in the Local Calling Area of the Qwest end-user to CLEC's POI located in the Local Calling Area of the Qwest end user.

4. Staff proposed language:

Section 7.2.2.1.7.4: Intercarrier compensation for FX-Like traffic exchanged between CLEC and Qwest during the interim period shall be \$0.0007 per MOU consistent with the rate for ISP-bound traffic established by the FCC.

5. Staff proposed language:

Section 7.2.2.1.7.5: FX-Like Traffic, for a Qwest end-user originated call, is not tandem-switched.

6. Staff proposed language:

Section 7.2.2.1.7.6: For purposes of implementing the interim arrangement, Level 3 shall establish a virtual POI in each Qwest Local Calling Area for the exchange of FX-Like traffic where Level 3 does not currently have physical collocation facilities. Level 3 agrees to compensate Qwest via monthly payments equivalent to the MRC charges for Private Line with EICT and Mux, ICDF frames and direct trunk transport (DTT) from the virtual POI to each end office in the Local Calling Area of the virtual POI as if facilities were provisioned to reach those Local Calling Areas where Level does not currently have physical collocation facilities. Level 3 also agrees to make a one time payment to Qwest to reimburse Qwest as if Qwest had constructed ICDF collocation in each Local Calling Area where Level 3 does not currently have physical collocation at this time.

7. Staff proposed language:

Section 7.2.2.1.7.7: If CLEC requires FX-Like Traffic arrangements with other LECs or wireless carriers, then CLEC is responsible for ordering FX-Like transit facilities from the POI in the applicable Local Calling Area and will have financial responsibility for direct trunking to the tandems for the exchange of transit traffic.

8. Staff proposed language:

Section 7.2.2.1.7.8: CLEC shall designate all Local Routing Numbers so that FX-Like Traffic associated with number portability routes directly from the Qwest end office to the CLEC.

9. Staff proposed language:

Section 7.2.2.1.7.9: CLEC will convert to the FX-Like service as a project and be responsible to provide network diagrams and order submission as necessary to provision all FX-Like trunking and transport.

10. Staff proposed language:

Section 7.2.2.1.7.10: Qwest has negotiated this arrangement under protest to comply with the Commission's Order which requires the Parties to implement an interim "FX-Like" arrangement pending the resolution of the Generic VNXX Docket. By implementing the foregoing arrangement related to "FX-like Traffic" neither Party waives its right to advocate in the Commission's Generic VNXX Proceeding or any other proceeding (including an appeal), positions inconsistent with the interim arrangements herein.

11. Staff proposed language:

Section 7.2.2.1.7.11: CLEC shall cease using VNXX as of the date FX-Like Traffic facilities are in place or August 28, 2006, which ever is later. Until the date the FX-Like Traffic facilities are in place, Qwest will exchange VNXX traffic on a bill and keep basis. The interim period begins when the FX-Like Traffic architecture has been provisioned and continues until the Commission issues a Decision resolving the issues concerning the use of Virtual NXX.